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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RONALD MASTERS,

Petitioner,

v.

DANIEL INTERNATIONAL CORPORATION, et al.

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Tenth Circuit

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QUESTIONS PRESENTED FOR REVIEW

Whether a nuclear civil Quality Control inspector's state common law claim for retaliatory discharge from employment is preempted by §210 of the Energy Reorganization Act.[1]

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[1] This was the issue presented to and stated by the Tenth Circuit in its opinion. However, the last sentence of the opinion is not limited to a state law claim for retaliatory discharge but rather "any state law claim for wrongful termination." If this is not mere dicta, and to the extent the opinion purports to decide issues not presented, e.g. whether a state common law claim for fraud, or wrongful interference with contract, etc., is preempted, then petitioner has been denied the opportunity to be heard on those issues, violating due process requirements under the Fifth Amendment (U.S. Const. Bill of Rights, art. 5). Had petitioner been given the opportunity to be heard on those issues, he would have and does hereby raise three additional issues: (1) Whether such decision would violate Article III separation of powers. (2) Whether such decision would violate petitioner's Seventh Amendment (U.S. Const. Bill of Rights, art. 7) and state (Kan. Const. Bill of Rights, §5) right to trial by jury where Congress creates an administrative remedy with no right to jury trial, and then that administrative remedy is judicially determined to preempt all state common law claims to which the right to jury trial attaches. (3) Whether such decision would violate state (Kan. Const. Bill of Rights, §18) and federal (U.S. Const. Bill of Rights, art. 5) due process requiring a quid pro quo when a common law remedy is replaced with a legislatively created administrative remedy.

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REPORT OF OPINIONS

The decision below is reported at Masters v. Daniel International Corporation, 895 F.2d 1295 (10th Cir. 1990).

JURISDICTION

The opinion of the Court of Appeals was entered on February 6, 1990. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 210 of the Energy Reorganization Act:

"42 U.S.C. §5851. Employee Protection.

"(a) Discrimination against employee

"No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)---

"(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

"(2) testified or is about to testify in any such proceeding or;

"(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.].

"(b) Complaint, filing and notification

"(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

"(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

"(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may

order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

"(c) Review

"(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of Title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

"(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

"(d) Jurisdiction

"Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

"(e) Commencement of action

"(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

"(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

"(f) Enforcement

"Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of Title 28.

"(g) Deliberate violations

> "Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.]."

As noted in footnote 1. to the Question Presented, if the decision below decides preemption of "any state law claim," then petitioner has been denied the opportunity to be heard on that issue, violating his right to due process of law under U.S. Const., Bill of Rights, art. 5, which provides in pertinent part:

> "No person shall be ... deprived of ... property without due process of law;"

Had the question of whether 42 U.S.C. §5851 preempts "any state law claim" been raised, then petitioner would have and does hereby raise the issue of whether such decision would violate separation of powers principles inherent in U. S. Const., Article III, which provides:

> "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

Further, whether such a decision would infringe his right to trial by jury under U. S. Const., Bill of Rights, art. 7, which provides in pertinent part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ..."

and his right to trial by jury in §5 of the Bill of Rights to the Constitution of the State of Kansas, which provides: "The right of trial by jury shall be inviolate."

Finally, petitioner raises the issue of whether his state and federal right to due

process requires a quid pro quo when a common law remedy is replaced with a legislatively enacted administrative remedy. Federal due process arises under the 5th Amendment quoted hereinabove. State due process arises under §18 of the Bill of Rights of the Constitution of the State of Kansas, which provides:

> "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

STATEMENT OF THE CASE

Ron Masters was employed by Daniel International Corporation (DIC) as a civil quality control inspector on December 20, 1980, in Tennessee. He received excellent reviews and was selected for transfer to the Wolf Creek Nuclear Power Station in Kansas which was under construction by DIC. Masters alleged his employment was

terminated August 22, 1984, in retaliation for having reported to the Nuclear Regulatory Commission (NRC) the failure of his employer, DIC, to inspect structural steel welds and his employer's falsification of structural steel blueprints during the construction of Wolf Creek.

Masters' Complaint alleged that in February, 1984, he was instructed to inspect and "close out" structural steel welds in the fuel building at the Wolf Creek Nuclear Generating Station. (Complaint, paragraph 6). During the inspection process, Masters discovered many of the welds had been embedded in concrete and there was no documentation that the welds had been inspected. (Complaint paragraphs 7 and 9). The procedure for certifying a weld inspection would be to mark on the structural steel blueprint and initial that the inspection had been done.

(Complaint paragraph 8). When plaintiff's supervisors learned that the welds had not been inspected, they took the structural steel blueprints from plaintiff and marked and initialed them as if the welds had been originally inspected. (Complaint paragraph 10).

On February 2, 1984, Masters, in conformity with his duty as an inspector under Federal law[2], informed the Nuclear Regulatory Commission's site representative of DIC's activities. (Complaint paragraph 11). Thereafter, DIC engaged in a campaign of harassment and intimidation of Masters until his employment was terminated on August 22, 1984, in retaliation

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[2] See 10 C.F.R. Part 50.

for his report to the NRC. (Complaint paragraph nos. 12 in Count I and Count II).

The NRC did investigate Masters' concerns and eventually in a written report dated October 7, 1985, the NRC concluded:

> "It is OI's (Office of Investigations) conclusion that Q.C. (Quality Control) inspection drawings were intentionally falsified."
>
> (Supplement to Motion to Alter or Amend, Doc. #49, 5/15/87, attachment, page 2).

Masters also reported DIC's campaign of intimidation and harassment against him. The NRC also investigated this allegation, and in the same written report dated October 7, 1985, concluded:

> "DIC supervisors, EPPERLY and MURPHY, did intentionally harass and discriminate against MASTERS....
>
> [Id., attachment at p. 22 (page 19 of the report)].

Masters did not file a claim with the Department of Labor within thirty days of his discharge as required by 42 U.S.C. §5851, basically because he was unaware that he needed to do so when DIC told him he was being laid-off rather than fired. (Plaintiff's Fourth Supplement To Motion To Alter Or Amend, Doc. #53, 6/23/87, affidavit attached).

Upon termination of his employment at Wolf Creek, Masters and his family moved to Illinois. There after a few months Masters visited with an attorney who, within one year of Masters' termination of employment, on August 22, 1985, filed this action in the United States District Court for the District of Illinois, alleging diversity of citizenship, 28 U.S.C. §1332, as the basis for jurisdiction. (Complaint paragraph 1). Three causes of action were alleged: (1) retaliatory discharge, (2) tort of outrage (intentional infliction of

emotional distress), and (3) violation of civil rights. DIC moved to dismiss on the grounds that, inter alia, all counts were preempted by 42 U.S.C. §5851. The Illinois District Court dismissed Count III, civil rights, for absence of an allegation of state action, and ordered venue transferred to Kansas for determination of the remainder of the motion to dismiss.

On April 24, 1987, the district court for the District of Kansas, Rogers, J., dismissed the remainder of the case for failure to state a claim upon which relief could be granted. (Memorandum and Order, Doc. #44, 4/24/87). The court dismissed Count I, retaliatory discharge, on the grounds Kansas law would not recognize a common law cause of action where there was another remedy. The court dismissed Count II, tort of outrage, on the grounds the conduct alleged did not amount to the tort of outrage as a matter of law. The dis-

trict court entered judgment for DIC on April 24, 1987.

Within ten days, on May 4, 1987, Masters filed a Motion To Alter Or Amend The Judgment. (Motion To Alter Or Amend, Doc. #46, 5/4/87).

On February 25, 1988, Masters' motion was granted in part and denied in part. (Memorandum and Order, Doc. #55, 2/25/88). The court's earlier order of dismissal of 4/24/87 was amended to a dismissal without prejudice, but the court adhered to its decision that plaintiff did not have a cause of action for retaliatory discharge under Kansas law; the district court refused to certify such question for determination by the Kansas Supreme Court, and further held for the first time that even if plaintiff did have a cause of action under state law then it was preempted by federal law, 42 U.S.C. §5851,

notwithstanding the unavailability of punitive damages and the short thirty (30) day statute of limitations.

Masters timely appealed to the United States Court of Appeals for the Tenth Circuit, raising two issues: (1) whether 42 U.S.C. §5851 preempts his state common law cause of action for retaliatory discharge, and (2) whether Kansas recognizes a cause of action for retaliatory discharge.

While the appeal to the Tenth Circuit was pending, and in fact within one month of the district court's decision on the motion to alter or amend, the Kansas Supreme Court recognized a common law cause of action for retaliatory discharge. See Palmer v. Brown, 242 Kan. 893, 752 P.2d 685 (1988).

On February 6, 1990, the Tenth Circuit issued its opinion affirming the ruling that Masters' state tort claim was pre-

empted by the "whistleblower" provision of the Energy Reorganization Act, 42 U.S.C. §5851.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. A NUCLEAR CIVIL QUALITY CONTROL INSPECTOR'S STATE COMMON LAW CLAIM FOR RETALIATORY DISCHARGE FROM EMPLOYMENT IS NOT PREEMPTED BY §210 OF THE ENERGY REORGANIZATION ACT.

A. This Court Recently Granted Certiorari In English v. General Electric Concerning Preemption Of State Claims By §210 Of The Energy Reorganization Act; There Is A Conflict Among The Courts On This Question.

This Court grants certiorari when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. Federal courts of appeal are divided on the issue of whether §210 of the Energy Reorganization Act preempts state law tort claims involving retaliato-

ry or wrongful discharge.[3] This Court recently granted certiorari in English v. General Electric Co., 871 F.2d 22 (4th Cir. 1989), cert. granted, 110 S.Ct. 862, 107 L.Ed.2d 946, to resolve this conflict. The facts in English are similar to the present case; moreover, the question for review is the same. This Court must grant certiorari herein so that Mr. Masters and the Tenth Circuit have the benefit of this Court's decision in English.

In English, plaintiff brought a state law tort claim for intentional infliction of emotional distress. The claim arose

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[3] Several jurisdictions have addressed the preemption issue involved in the present case. Some have found preemption: English v. General Electric Co., 683 F.Supp. 1006 (E.D. N.C. 1988), aff'd per curiam on basis of the decision below, 871 F.2d 22 (4th Cir. 1989), cert. granted,

(Continued on following page)

from her termination and harassment after she reported safety violations to the NRC. The Fourth Circuit Court of Appeals found her claim was preempted. Certiorari has been granted. Masters hereby incorporates the argument and authorities in the Petition for Certiorari filed by petitioner and in the Brief For The United States As Amicus Curiae filed by the Solicitor General in English.

B. The Decision Below Conflicts With Applicable Decisions Of This Court.

This Court has also granted certiorari in cases when a federal court of appeals has decided a federal question in a way in

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110 S.Ct. 862, 107 L.Ed.2d 946; Snow v. Bechtel Const., Inc., 647 F.Supp. 1514 (C.D. Cal. 1986); Chrisman v. Philips Indus., Inc., 242 Kan. 772, 751 P.2d 140 (1988). Others have not: Norris v. Lumberman's Mut. Cas. Co., 881 F.2d 1144 (1st Cir. 1989); Garg v. Narron, 710 F.Supp. 1116 (S.D. Tex. 1989); Gaballah v. P.G.&E., 711 F.Supp. 988 (N.D. Cal. 1989); Wheeler v. Caterpillar Tractor Co., 108 Ill.2d 502, 92 Ill.Dec. 561, 485 N.E.2d 372 (1985), cert. den., 475 U.S. 1122, 106 S.Ct. 1641 (1986).

conflict with applicable decisions of this Court. The holding of the Tenth Circuit below is contrary to this Court's controlling decisions. In Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 78 L.Ed.2d 443, 104 S.Ct. 615 (1984), the Court analyzed the requirements for preemption in the nuclear field. The Court cited Pacific Gas & Electric v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 75 L.Ed.2d 752, 103 S.Ct. 1713 (1983), saying:

> "Congress...intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant."

Silkwood, 464 U.S. at 249, 104 S.Ct. at 622. Masters' case does not concern regulation of the radiological safety aspects of a nuclear plant. To the extent respondent might argue that it could do so in a collateral way, it certainly concerns

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those aspects in a way far more remote than the state tort remedies for radiation injuries at issue in Silkwood.

In Silkwood, this Court refused to recognize Kerr-McGee's contention that allowance of state tort claims for punitive damages would have the effect of punishing and deterring "conduct related to radiation hazards" and therefore would be within the "nuclear safety area". Id. The Court said:

> "It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards but that regulatory consequence was one congress was quite willing to accept." (emphasis added).
>
> Id., 464 U.S. at 256.

Silkwood concluded that state tort claims are not preempted by the Atomic

Energy Act, 42 U.S.C. §2011 et. seq. A state tort claim for retaliatory discharge from employment is less intrusive than a negligence or strict liability claim.

Kansas recognizes the tort of retaliatory discharge. Palmer v. Brown, 242 Kan. 893, 752 P.2d 685 (1988). This cause of action does not necessitate invasion of the NRC's authority to regulate safety matters. In defining the cause of action, the Kansas Supreme Court said:

> "To maintain such action, an employee has the burden of proving by clear and convincing evidence, under the facts of the case, a reasonably prudent person would have concluded the employee's co-worker or employer was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare; the employer had knowledge of the employee's reporting of such violation prior to discharge of the employee; and the employee was discharged in retaliation for making the report."

> Id., 242 Kan. at 900, 752 P.2d at 690.

Thus, retaliatory discharge cases boil down to a basic discrimination case wherein the employee proves a reasonably prudent person would have concluded that the employer was violating the law, that the employee reported same, and that the employee was discharged in retaliation for doing so. The employer will inevitably contend the discharge was motivated by other legitimate reasons, and the employee will need to show those reasons were pretextual. If as held in Silkwood Congress did not intend to preempt state tort remedies for radiation torts, certainly Congress did not intend to preempt state tort remedies for employee discharge.

Protecting the residual powers and sovereignty of the states is the very essence of federalism, and this Court has consistently protected state tort law from

federal preemption absent unavoidable conflict with federal law. Nader v. Allegheny Airlines, 426 U.S. 290, 48 L.Ed.2d 643, 96 S.Ct. 1978 (1976); Askew v. American Waterways Operators, 411 U.S. 325, 36 L.Ed.2d 280, 93 S.Ct. 1590 (1973).

In cases under the Labor Management Relations Act (LMRA) or the National Labor Relations Act (NLRA), the preemption doctrine has developed by judicial decision because of the perceived need for a national labor relations policy warranting a broader than usual preemptive reach for federal law. Although this is neither an LMRA nor an NLRA case, distinctions developed in this area can provide a useful indication of the extreme limits of preemption in an area preempted by Congress. In this field, as elsewhere, this Court has consistently preserved against preemption the right of the states to enforce

traditional common law remedies, including punitive damages, for tortious conduct. See United Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656, 98 L.Ed. 1025, 74 S.Ct. 833 (1954) ($100,000 punitive damages on a state tort claim for what was also an unfair labor practice). This preservation of state tort law applies not only to damage actions for direct physical harm, as was involved in Silkwood, but even extends to such other torts as libel, Linn v. United Plant Guard Workers, 383 U.S. 53, 15 L.Ed.2d 582, 86 S.Ct. 657 (1966), intentional infliction of emotional distress, Farmer v. United Brotherhood of Carpenters and Joiners, 430 U.S. 290, 51 L.Ed.2d 338, 97 S.Ct. 1056 (1977), and tortious interference with employee's lawful occupation, International Union, U. A., A. & A. I. W. v. Russell, 356 U.S. 634, 2 L.Ed.2d 1030, 78 S.Ct. 932

(1958) (in case subject to NLRA, state court could award compensatory and punitive damages for tortious conduct which was also an unfair labor practice and for which NLRB could award back pay; no conflict in state and federal remedies).

See particularly: Lingle v. Norge Division of Magic Chef, 486 U.S. 399, 100 L.Ed.2d 410, 108 S.Ct. 1877 (1988) (state tort action for wrongful discharge not preempted by the NLRA); Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) (no preemption under NLRA for retaliatory discharge for filing worker's compensation claim); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. den., 471 U.S. 1099, 105 S.Ct. 2319, 85 L.Ed.2d 839 (1985) (no preemption under LMRA for retaliatory discharge for whistleblowing).

Section 210 does not, of course, contain an express preemption provision. The statute itself repeatedly uses the

permissive "may" language. Congress has not totally occupied the field in the nuclear industry. Silkwood, supra. Masters' tort claim against his former employer is fully consistent with §210, does not pose an irreconcilable conflict with §210, and does not tend to frustrate the objectives of §210. International Union, U. A., A. & A. I. W. v. Russell, supra.; California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 94 L.Ed.2d 577, 107 S.Ct. 1419 (1987). It is not impossible to comply with both federal and state law. Garner v. Teamsters, C. & H. Union, 346 U.S. 485, 98 L.Ed. 228, 74 S.Ct. 161 (1953). The state tort law on which Masters bases his claim does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in §210. Michigan Canners and Freezer Assoc., Inc. v. Agricultural Mktg.

& Bargaining Bd., 467 U.S. 461, 81 L.Ed.2d 399, 104 S.Ct. 2518 (1984). Indeed, express congressional disapproval of employer practices in §210 is consistent with an increased insistence upon state tort liability, and is inconsistent with permitting the employer to use §210 as a complete shield against liability herein. Preemption twists the "employee protection" provisions of §210 into employer protection.

II. IF THE DECISION BELOW DECIDES PREEMPTION OF ANY STATE LAW CLAIM, THEN PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW IN THAT HE HAS BEEN DENIED THE OPPORTUNITY TO BE HEARD ON THAT ISSUE, AND SUCH DECISION WOULD VIOLATE FEDERAL AND STATE CONSTITUTIONAL RIGHTS IN THE FOLLOWING THREE WAYS.

As indicated in the footnote to the Question Presented, the issue presented to the Tenth Circuit was: "Is a nuclear civil quality control inspector's state common law claim for retaliatory discharge

against his employer preempted by 42 U.S.C. §5851?" (See Brief of Appellant, emphasis added). In its Opinion, the Tenth Circuit stated the issue: "Whether a state law claim for retaliatory discharge in response to an employee making safety related complaints to the Nuclear Regulatory Commission is preempted by 42 U.S.C. §5851 is a matter of first impression in this circuit." (Opinion at p. 2, emphasis added). Yet, at the end of its Opinion, the Tenth Circuit said "...the Court concludes that Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851 preempts any state law claim for wrongful termination for reporting safety violations under the Act." (Opinion at p. 4, emphasis added). If this is not mere dicta, and if the opinion below purports to decide issues not presented, then Masters was never given the opportunity to

be heard on whether §210 preempts any state law claim,[4] denying him due process of law. Had that question been raised, then Masters would have and does hereby raise the following issues.

A. Such A Decision Would Violate Article III Separation Of Powers.

This is not a case in which the Government is involved in its sovereign capacity under a statute creating new "public rights," which may be assigned to an administrative agency without violating the constitutional mandate of separation of powers in Article III. In Northern Pipeline Construction Co. v. Marathon

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[4] This is important because Masters has another case pending (D.C. Case No. 87-1290-C) in the United States District Court for the District of Kansas against DIC and Kansas Gas & Electric Company arising out of the termination of his employment alleging causes of action based upon the Racketeer Influenced Corrupt Organizations Act, and other state common law torts of fraud, conspiracy, and interference with contract. (See Complaint attached to

(Continued on following page)

Pipe Line Co., 458 U.S. 50, 73 L.Ed.2d 598, 102 S.Ct. 2858 (1982), this Court's lead opinion recognized "three narrow situations" where "the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers." Id., 458

(Continued from previous page)

Fifth Supplement To Motion To Alter Or Amend, Doc. #54, 9/16/87, later amended to add interference with contract). Since the instant case was dismissed without prejudice for failure to state a claim (see Memorandum and Order, Doc. #55, Rogers, J., 2/25/88 at p. 13), Masters was free to and did amend and/or refile this case pleading other causes of action in Case No. 87-1290-C. However, petitioner and respondent have been proceeding herein under the assumption that under principles of res judicata, the instant case does finally determine whether Masters' state common law action for retaliatory discharge against DIC is preempted.

U.S. at 64. Two of those exceptions, "territorial courts" (Id., 458 U.S. at 64-65) and "the power to establish and administer courts-martial" (Id., 464 U.S. at 66) are not even arguably applicable here. The third encompasses legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights." This "public rights"

> "doctrine extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative department,' Crowell v. Benson, 285 U.S. 22, 50 (1932), and only to matters that historically could have been determined exclusively by those departments, see Ex parte Bakelite Corp., supra, [279 U.S.] at 458."
>
> Id., 458 U.S. at 67.

This suit seeking private damages for a common law tort is a wholly private tort case. Congress cannot create an administrative remedy which a court can constitu-

tionally hold to be exclusive and preemptive of all state common law tort remedies, without running afoul of Article III principles protecting the role of the independent federal judiciary within the constitutional scheme of tripartite government.

B. Such A Decision Would Violate Federal And State Constitutional Guarantees Of The Right To Trial By Jury.

Had the question of preemption of <u>any</u> state law claim been raised, then Masters would have and does hereby raise the issue of whether his Seventh Amendment (U.S. Const. Bill of Rights, art. 7) and state (Kan. Const. Bill of Rights, §5) right to trial by jury is violated.

Where Congress creates an administrative remedy with no right to jury trial, and then such administrative remedy is judicially determined to preempt all state common law claims to which the constitutional right to jury trial attaches, then

that right is infringed. See Crowell v. Benson, 285 U.S. 22, 51-65, 52 S.Ct. 285, 76 L.Ed. 598 (1932), where the Court said: "On the common law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself." Id., 285 U.S. at 51. Crowell indicates that in cases involving only "private rights," the Court will accept fact-finding by an administrative agency, without a jury, only as an adjunct to an Article III court.[5] When a federal statute embraces a common law form of action

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[5] 42 U.S.C. §5851 nowhere provides for an appeal to or review in a district court where a jury trial might be allowed. The only sort of intervention by a court at any stage of the proceedings is provided in subsection (c), providing for review in the Court of Appeals, and in subsection (e), allowing suit in district court solely for enforcement of the Secretary's order.

> "that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in action for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights."

United States v. Jepson, 90 F.Supp. 983, 986 (D.N.J. 1950) (emphasis added). Cf. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L.Ed. 893, 57 S.Ct. 615 (1937) (Seventh Amendment not applicable to suit deciding commission of unfair labor practice because it was a statutory proceeding unknown to the common law).

C. Such A Decision Would Violate Federal And State Constitutional Guarantees Of Due Process Because $210 Does Not Provide A Fair Quid Pro Quo.

Had the question of preemption of any state law claim been raised, then Masters

would have and does hereby raise the issue of whether his state and federal right to due process requires a fair quid pro quo when a common law remedy is replaced with a legislatively enacted administrative remedy---a question left unanswered by Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

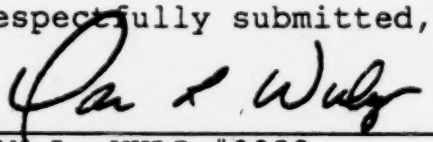
Where Congress creates an administrative remedy which is judicially determined to preempt all state common law claims to which the constitutional right to due process attaches, then that right is infringed unless a fair quid pro quo is allowed. Constitutional due process in Kansas requires a quid pro quo. Samsel v. Wheeler Transport Services, Inc., --- Kan. ---, --- P.2d ---, 1989 WL 200337. As concerns federal due process, that question was left unanswered in Duke Power Co., supra.

Here, if all state common law torts are held to be preempted by §210, then Masters has lost: his constitutional right to trial by jury, the right to claim punitive damages, and most importantly the practical right to any remedy at all because of the unfairly short 30-day statute of limitations in §210. In exchange for these losses, the only quid pro quo offered by a §210 administrative procedure and not available in court in this case is attorneys' and expert witness fees. And of course this is quite a hollow exchange when claims are barred by the 30-day period of limitation in §210. Actually, §210 operates as a trap for the unwary, as a black hole sucking in and destroying legitimate employee claims by virtue of its 30-day period of limitation. This is hardly a fair quid pro quo.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that the Court grant this Petition and issue its writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the opinion of that court in Petitioner's case.

Respectfully submitted,



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APPENDIX

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(Filed 2/6/90)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RONALD MASTERS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 88-1345
	)	(D.C. No.
DANIEL INTERNATIONAL CORP.,	)	86-4258-R)
	)	
Defendant-Appellee.	)	

JUDGMENT
Entered February 6, 1990

Before McKAY and TACHA, Circuit Judges, and RUSSELL, District Judge.*

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*Honorable David L. Russell, United States District Judge for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
ROBERT L. HOECKER, Clerk
By: Patrick Fisher
Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RONALD MASTERS, Appellant,	)	
-vs-	)	No. 88-1345
DANIEL INTERNATIONAL CORPORATION, Appellee.	)	

Appeal from the United States District Court for the District of Kansas (D.C. 86-4268-R)

Dan L. Wulz, Bryan, Lykins, Hejtmanek & Wulz, Topeka, Kansas, Attorneys for Appellant

Leonard J. Spooner of Thompson, Mann and Hutson, Greenville, SC, Lizabeth Lee Walther, Thompson, Mann and Hutson, Washington, D.C., and Arthur E. Palmer of Goodell, Stratton, Edmonds & Palmer, Topeka, Kansas, Attorneys for Appellee

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Before McKAY and TACHA, Circuit Judges, and RUSSELL, District Judge.*

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*Honorable David L. Russell, United States District Judge for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

The appellant Ron Masters brought this action for retaliatory discharge in the district court alleging that his former employer appellee Daniel International Corporation ("Daniel") terminated him for having reported safety related

concerns to the Nuclear Regulatory Commission ("NRC").

This appeal is from a decision of the district court dismissing Masters' claim on the basis that the claim was preempted by Section 210 of the Energy Reorganization Act 42 U.S.C. §5851.

The facts as alleged by Masters are that on February 2, 1984 he notified the NRC of his safety related concerns about work he was doing at the Wolf Creek Nuclear Generating Station in Kansas. Ultimately the NRC's investigation vindicated Masters complaint. In the meantime Masters was terminated by Daniel allegedly for being a whistleblower.

Masters did not file a claim with the Department of Labor within thirty days of his termination as required by 42 U.S.C. §5851(b)(1); rather, he later brought this action for retaliatory discharge.

Whether a state law claim for retaliatory discharge in response to an employee making safety related complaints to the Nuclear Regulatory Commission is preempted by 42 U.S.C. §5851 is a matter of first impression in this circuit. Other circuits which have ruled on this issue have reached differing conclusions.

In English v. General Electric Co., 871 F.2d 22 (4th Cir. 1989) the Court found that the Energy Reorganization Act was intended by Congress to be the exclusive remedy for employees who allege discrimination resulting from safety complaints and that state law claims were thus preempted. In Snow v. Bechtel Construction, Inc., 647 F.Supp. 1514 (C.D. of Calif. 1986) that court also concluded that state law claims were preempted, but based on the premise that primarily safety concerns were being addressed by the

Energy Reorganization Act and that in accord with Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 212, 103 S.Ct. 1713, 1726, 75 L.Ed.2d 752, 770 (1983), "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited power expressly ceded to the states." In Snow the Court drew a corollary between the "whistleblower" provision of § 5851 and the Mine Safety and Health Act, 30 U.S.C. § 820, which are quite similar. In Olguin v. Inspiration Consol. Copper Company, 740 F.2d 1468 (9th Cir. 1984) that court found that the "whistleblower" provision of the Mine Safety and Health Act was an exclusive remedy and preempted state action. Also see Chrisman v. Philips Industries, Inc., 751 P.2d 140 (Kan. 1988).

To the contrary in Norris v. Lumberman's Mutual Casualty Co., 881 F.2d 1144 (1st Cir. 1989) the court concluded that the Energy Reorganization Act did not preempt state law claims. In accord with this position also see Gaballah v. Pacific Gas and Electric Co., 771 F.Supp. 988 (N.D. Cal. 1989); Stokes v. Bechtel North American Power Corp., 614 F.Supp. 732 (N.D. Cal. 1985); Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372 (1985 Ill.).

After review of the cited cases and the opinion of the District Court the Court concludes that Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851 preempts any state law claim for wrongful termination for reporting safety violations under the Act.

The Court therefore AFFIRMS the district court's order dismissing the complaint.

The mandate shall issue forthwith.

ENTERED BY THE COURT PER CURIAM

(Filed 2/25/88)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

RONALD MASTERS, Plaintiff,	)	
vs.	)	Case No. 86-4268-R
DANIEL INTERNATIONAL CORPORATION, Defendant.	)	

MEMORANDUM AND ORDER

This matter is presently before the court upon plaintiff's motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59. Plaintiff has requested oral argument but the court deems it unnecessary. Having carefully reviewed the materials before the court, we are now prepared to rule.

Plaintiff originally filed this action in federal court in Illinois. In his complaint, he alleged that he was

discharged by the defendant from his position as structural weld inspector at the Wolf Creek Nuclear Power Plant located near New Strawn, Kansas, in retaliation for reporting safety hazards at the plant to the Nuclear Regulatory Commission. The complaint contained the following causes of action: (1) a retaliatory discharge claim; (2) an intentional infliction of emotional distress claim; and (3) a civil rights claim. The federal district judge in Illinois dismissed plaintiff's third cause of action and transferred the case to this court pursuant to 28 U.S.C. §1404(a). The defendant had also sought dismissal of plaintiff's two claims, but the Illinois judge held those arguments in abeyance for a decision by this court.

On April 24, 1987, the court granted defendant's motion for dismissal of the remaining claims. We held that, under

Kansas law, plaintiff had failed to state a claim upon relief could be granted under either a retaliatory discharge theory or an intentional infliction of emotional distress theory. We determined that plaintiff could not assert a retaliatory discharge claim because he had a remedy available to him under Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851. In addition, we found that plaintiff's allegations of harassment and termination from employment were insufficient to state a claim for intentional infliction of emotional distress.

Plaintiff filed the instant motion on May 4, 1987. In this motion, plaintiff argues that the court should reconsider its decision on his retaliatory discharge claim based on facts developed during discovery. In the alternative, plaintiff asks that the court certify the question

of whether he has stated a retaliatory discharge claim to the Kansas Supreme Court pursuant to K.S.A. 60-3201 et seq. Plaintiff followed this motion with a "supplement" on May 5, 1987. This first "supplement" suggested that the court's judgment in this case violated plaintiff's right to a remedy "by due course of law" as guaranteed by the Kansas Constitution and the United States Constitution. Defendant filed its response to plaintiff's motion to alter or amend on May 15, 1987. On that same date, plaintiff filed another "supplement" and "motion to vacate, suspend, stay or set aside judgment pending requested discovery and/or time to file an amended complaint." In this second supplement, plaintiff asked the court to grant its previous requests based on new information. Plaintiff also requested that, if we certified the proposed question of law, we retain jurisdiction over discovery

and/or time to file an amended complaint alleging fraud, conspiracy and/or a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq. (RICO). Plaintiff filed yet another "supplement" on May 20, 1987. In this third supplement, plaintiff first asked the court to specifically rule that the judgment in this case was not "on the merits." In addition, plaintiff asked the court for 45 days within which to file an amended complaint. Defendant responded with a motion to dismiss plaintiff's pleadings of May 5, 1987 and May 15, 1987 as untimely on June 1, 1987. Undeterred, plaintiff filed another "supplement" to his original motion on June 23, 1987. This fourth "supplement" consisted solely of a clarification to the affidavit filed by plaintiff with his original motion to alter or amend. Finally, plaintiff filed his last "supplement" on September 16,

1987. This fifth supplement indicated that plaintiff had filed a complaint on May 29, 1987 against Daniel International Company, Kansas Gas and Electric Company, and two individuals in federal court in Wichita alleging RICO, fraud and conspiracy claims.

This background provides a myriad of issues to decide. The court shall first address the defendant's motion to dismiss plaintiff's supplements of May 5, 1987 and May 15, 1987. The court shall also apply the arguments made therein to the later supplements filed by plaintiff. Defendant suggests that these supplements are both untimely and improper. Defendant argues that the matters raised in plaintiff's supplements are "redundant, immaterial and impertinent" to the earlier issued decided by the court. Plaintiff, in response, contends that the supplements should be considered by the court because they only

present additional arguments and authorities in support of the motion or inform the court of facts first discovered after the filing of the motion.

The Federal Rules of Civil Procedure do not recognize "supplements." Nevertheless, this court has in the past considered such pleadings when they raise only additional arguments and authorities. Several of the supplements filed by plaintiff come within this rule, and we shall consider them as part of plaintiff's Rule 59(e) motion. The court shall consider the supplements designated as "first," "second" and "fourth" under Rule 59(e). However, the "third" supplement is clearly outside the scope of additional arguments and authorities. In this supplement, plaintiff asks the court to find that its original decision was not on the merits and asks the court for 45 days in which to

file an amended complaint. This supplement goes beyond merely stating additional arguments and authorities and asks for additional affirmative relief. We shall view this supplement as a motion for relief under Fed.R.Civ.P. 60(b). Accordingly, defendant's motion to dismiss plaintiff's supplemental pleadings as untimely shall be denied.

We shall now address the merits of the arguments raised by the plaintiff in the instant motion. Plaintiff first argues that the court incorrectly concluded that he did not state a claim for retaliatory discharge under Kansas law. Plaintiff contends that the "important and fundamental public policy involved in nuclear safety and preservation of lives and property of Kansas citizens" requires that he be allowed to proceed with his retaliatory discharge claim. Plaintiff relies upon Wheeler v. Caterpillar Tractor

Co., 108 Ill.2d 502, 485 N.E.2d 372 (1985), cert. denied, 475 U.S. 1122 (1986) to bolster this argument. In the alternative, plaintiff suggests that even if we continue to adhere to the "no other available remedy" requirement for the allowance of retaliatory discharge claim, then we should require that the available remedy be adequate. Plaintiff argues that the available remedy suggested by the court here, 42 U.S.C. §5851, is inadequate because of the short period, 30 days, in which an individual must report the discriminatory treatment and the absence of the availability of punitive damages which would be allowed under Kansas law. Plaintiff contends that the facts of this case demonstrate the injustice of the 30-day limitations because the defendant misled the plaintiff into believing he was laid off rather than terminated. Finally, the plaintiff asks the court to certify the following question to the Kansas

Supreme Court if we do not believe that our prior order should be reversed:

> In a private employer/employee relationship not contractually protected by any collective bargaining agreement, where an employee is harassed, intimidated, and discharged for having reported to the NRC safety-related deficiencies and falsification of documents by his employer in the construction of the Wolf Creek Nuclear Power Plant, and such employer conduct is violative of federal law and state common law cause of action for retaliatory discharge, when federal law provides a remedy to such an employee but the remedy may be viewed as inadequate because of requisites of federal law (i.e. here, a 30-day statute of limitations) and because it does not provide remedies available under state law (i.e. here, punitive damages)?

In our order of April 24, 1987, we thoroughly examined the tort of retaliatory discharge, but we find it necessary to reiterate several points and examine several other in light of the arguments

made by plaintiff. Kansas generally follows the employment-at-will doctrine. Morriss v. Coleman Co., Inc., 241 Kan. 501, 738 P.2d 841, 847 (1987). Nevertheless, Kansas recognizes a limited public policy exception to the doctrine--the tort of wrongful or retaliatory discharge. This exception was first created and extended to employees-at-will in Murphy v. City of Topeka, 6 Kan.App.2d 488, 630 P.2d 186 (1981). Following Murphy, this court determined in Tarr v. Riberglass, Inc., No. 83-4234 (D.Kan., unpublished, 2/8/84), that an employee in Kansas must be without any other remedy under either federal or state law in order to state a retaliatory discharge claim. Plaintiff takes issue with the decision in Tarr and believes the court should reconsider its ruling.

The court believes that subsequent decisions by the Kansas Supreme Court add

support to our finding in Tarr. The Kansas Supreme Court has recognized that the holding in Murphy was "narrowly drawn" and applies only to interests protected by state law. Anco Construction Co. v. Freeman, 236 Kan. 626, 693 P.2d 1183, 1186 (1985). Moreover, the Court has refused to extend the retaliatory discharge theory to an employee covered by a collective bargaining agreement. Cox v. United Technologies, Essex Group, Inc., 240 Kan. 95, 727 P.2d 456 (1986). The key to Cox was the fact that the contractual agreement provided the employee with protective remedies and, thus, a retaliatory discharge claim was unnecessary.

In addition, many of the courts around the country that recognize the tort of retaliatory discharge have refused to allow such a claim where the employees had

statutory or administrative remedies available to them. See, e.g., Pinder v. Dean, 70 Md.App. 252, 520 A.2d 1119 (1987); Darling v. General Electric, 350 Pa.Super. 183, 504 A.2d 306 (1986); Corbin v. Sinclair Marketing, Inc., 684 P.2d 265 (Colo.App. 1984); Ohlsen v. DST Laboratories, Inc., 111 Mich.App. 580, 314 N.W.2d 699 (1981). These cases contribute some additional persuasive reasoning to the result reached in Tarr.

Plaintiff also asserts that the court should extend Tarr, if we are not inclined to reverse it, to require that other available remedies be adequate. With this requirement, plaintiff argues that the remedies provided by 42 U.S.C. §5851 are inadequate because of the absence of punitive damages and the brief period of limitations.

We are not prepared to accept plaintiff's argument for several reasons.

The court continues to believe that the focus for the purpose of determining whether to allow a retaliatory discharge claim should be on the availability of the remedy, not the adequacy of the remedy. In any event, even assuming arguendo that we accepted plaintiff's adequacy requirement, we do not believe that the result would be changed in this case. The remedies available to a complainant pursuant to 42 U.S.C. §5851 include: (1) reinstatement with compensation (including back pay); (2) compensatory damages; (3) all costs and expenses (including attorney's and witness fees); and (4) if a person fails to comply with an order issued by the Secretary of Labor, the district courts may grant all appropriate relief including injunctive relief, compensatory and exemplary damages. 42 U.S.C. §5851(b)(2)(B) and (d). In this case,

plaintiff is seeking: (1) compensatory damages; (2) punitive damages; and (3) court costs. We think the remedies provided by 42 U.S.C. §5851 are sufficient to have satisfied plaintiff's claims even though punitive damages are not allowed. The remedies provided by 42 U.S.C. §5851 go beyond what plaintiff could receive based on a retaliatory discharge claim since plaintiff could also receive attorney's fees and reinstatement. This conclusion is supported by the Kansas Supreme Court's reliance in Cox on Phillips v. Babcock and Wilcox, 349 Pa.Super. 351, 503 A.2d 36 (1986). In Cox, the Kansas court quoted the following passage from Phillips:

> Furthermore, we are not persuaded by appellant's argument that the wrongfully discharged at-will employee had greater remedies available in a civil action than does a union employee under a collective bargaining agreement since a civil court could award punitive damages. While the at-will employee may be entitled to punitive damages in a civil

> action, he does not have the ability to obtain some of the remedies available to union members; such as reinstatement to his position, which is a commonly provided remedy in labor agreements. Thus, we find that a difference in remedies is not enough to justify an extension of the coverage of the wrongful discharge action.

727 P.2d at 459 (quoting from 503 A.2d at 38).

Plaintiff's contention that the remedy of 42 U.S.C. §5851 is inadequate based on length of the limitations period is puzzling. Plaintiff suggests that a 30-day statute of limitations is inadequate to remedy the important interests at stake. Plaintiff argues that DelCostello v. International Board of Teamsters, 462 U.S. 151 (1983) supports this argument.

We wholly disagree with plaintiff's argument. Congress, which provided the remedy set forth in 42 U.S.C. §5851, believed that 30 days was sufficient, and

we do not see how this court can interfere with a policy decision made by Congress. DelCostello provides no support for plaintiff's contention. In DelCostello, the Supreme Court was faced with an issue often faced by federal courts--the statute of limitations applicable to a federal cause of action where none has been established by Congress. Here, Congress has established a limitations period, and we do not have the liberty to establish our own or find it inadequate.

Plaintiff also has taken the position that the limitations period of 42 U.S.C. §5851 should be tolled because he was misled by the defendant as to whether he had been terminated or laid off. This argument is of no moment here because §5851 would have protected plaintiff whether he was laid off or terminated. The remedies §5851 are available to "any

employee who believes that he has been discharged or otherwise discriminated against."

In addition, plaintiff raises this argument in the wrong forum. Plaintiff has never attempted to seek the remedies provided by 42 U.S.C. §5851. He could have sought such relief after the expiration of the 30-day period and made his tolling arguments to the Secretary. See, e.g., Rose v. Secretary of Dept. of Labor, 800 F.2d 563 (6th Cir. 1986). Here, plaintiff has made absolutely no efforts to pursue his claim under 42 U.S.C. §5851. Plaintiff should not be allowed to challenge the sufficiency of remedies of §5851 in this court when he has made no effort to avail himself of them.

In Cox v. Radiology Consulting Associates, Inc., 658 F.Supp. 264 (W.D.Pa. 1987), the court was faced with the same

issue presented here: should plaintiff be allowed to pursue a state wrongful discharge claim where he had a remedy available to him under 42 U.S.C. §5851 even though that remedy may now be foreclosed for his failure to timely file under §5851? The Cox court determined that Pennsylvania would decline to allow a wrongful discharge claim under these circumstances. Id., at 266. This decision, we believe, is very persuasive here due to the similarities between Kansas law and Pennsylvania law on tort of wrongful discharge. See Cox v. United Technologies, Essex Group, Inc., supra, 727 P.2d at 458-59 (citing and relying on Pennsylvania case law in the area of wrongful discharge for authority).

Plaintiff raises one final point. Relying on Wheeler v. Caterpillar Tractor Co., 108 Ill.2d 502, 458 N.E.2d 372

(1985), plaintiff asserts: "The Supreme Court of Illinois . . . reached a result contrary to that of this court in holding that Congress did not intend to preempt the field of retaliatory discharge under the Energy Reorganization Act." As pointed out by the defendant, plaintiff completely misunderstands the court's order of April 24. The court did not reach the issue of whether 42 U.S.C. §5851 preempted state claims for retaliatory discharge, although we recognized that the defendant had made such an argument. The court's order was based on the determination that the presence of an available remedy precludes the need to expand the judicially created exception of retaliatory discharge. Thus, plaintiff's suggestion that we reached a result contrary to the Illinois Supreme Court is totally incorrect. However, since we have been given another opportunity to examine this issue, we are now prepared to

hold contrary to the Illinois court as an alternative basis for our earlier decision. Based on the persuasive opinions of Snow v. Bechtel Construction, Inc., 647 F.Supp. 1514 (C.D.Cal. 1986) and the dissenting judges in Wheeler v. Caterpillar Tractor Co., supra, at 377, we conclude that §5851 preempts plaintiff's retaliatory discharge claim.

Plaintiff's contentions that the court's dismissal of his complaint violates his right to a remedy "by due course of law" as guaranteed by section 18 of the bill of rights of the state of Kansas Constitution, and his right to a jury trial under the Kansas Constitution and the United States Constitution, are clearly without merit. Section 18 of the bill of rights of the Kansas Constitution has been interpreted to mean that Kansas courts shall provide a remedy "for such

wrongs that are recognized by the law of the land." Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934, 943 (1954). Section 18 does not require courts to create a cause of action where the laws of Kansas do not recognize one. Schmeck v. City of Shawnee, 231 Kan. 588, 647 P.2d 1263, 1267 (1982). In addition, dismissal of a complaint for failure to state a claim does not violate a plaintiff's right to a jury trial under either the Kansas Constitution or the United States Constitution. See Sullivan v. United States, 788 F.2d 813, 816 (1st Cir. 1986).

Plaintiff has asked the court to certify the question of whether he has stated a retaliatory discharge claim to the Kansas Supreme Court pursuant to K.S.A. 60-3201. Certification is a discretionary function. This court has in the past employed considerable restraint before certifying questions to the Kansas

Supreme Court. See, e.g., Valdez v. Kansas State Department of Social and Rehabilitation Services, No. 76-24-C5 (D.Kan., unpublished, 1/29/82). Here, we believe that certification is inappropriate for several reasons. First, the request comes too late in the game. See Lenherr v. NRM Corp., No. 76-169-C5 (D.Kan., unpublished, 11/19/80); United States v. More, T-5331 (D.Kan., unpublished, 5/16/80). Plaintiff could have and should have requested certification long ago if he believed that this was an appropriate case. Judicial economy and efficiency would not be served by certification at this point. Second, we firmly believe that our conclusion in this case is correct. We do not wish to overburden the Kansas courts with questions that can be resolved based on their past cases. Plaintiff has not raised any persuasive argument that commands a result

different than that reached by this court. Finally, the court's reliance in this order on the preemption doctrine precludes certification. The question of whether 42 U.S.C. §5851 preempts any state claims made by the plaintiff is a matter of federal law and would be inappropriate for decision by the Kansas Supreme Court. See Snow v. Bechtel Corp., supra., at 1517-19. In sum, after consideration of the interests of judicial efficiency and economy, and federal-state comity, the court shall deny plaintiff's request for certification.

We next turn to plaintiff's motion to file an amended complaint. Actually, plaintiff has requested that he be given time to file an amended complaint. However, has since advised the court that he filed a complaint identical to his proposed amended complaint in federal court in Wichita. Therefore, the court shall

construe plaintiff's motion as one to file an amended complaint. Plaintiff seeks to file an amended complaint based on new information he received following the dismissal of his other claims.

Following an entry of judgment on the dismissal of a complaint by a district court, a plaintiff may amend the complaint under Fed.R.Civ.P. 15(a) only after the judgment has been set aside or vacated pursuant to a motion under Rule 59(e) or Rule 60(b) and leave of court to amend has been granted. Cooper v. Shumway, 780 F.2d 27, 29 (10th Cir. 1985). As noted previously, we shall consider plaintiff's motion to file an amended complaint under Rule 60(b) because the request was made more than ten days after the entry of final judgment.

Having carefully reviewed the plaintiff's contentions concerning the proposed

amended complaint, we believe that plaintiff has stated sufficient grounds to vacate the court's earlier order and allow his amended complaint to be filed. The amended complaint is based on "newly discovered evidence" and, thus, relief is appropriate under Rule 60(b)(2). Ordinarily, would we simply vacate our prior judgment and allow the plaintiff to file an amended complaint. However, plaintiff has already filed a complaint identical to the complaint he proposes to file in this court in federal court in Wichita. Under these circumstances, we shall amend our earlier order and dismiss plaintiff's complaint without prejudice. This will allow plaintiff to proceed on the complaint he filed in federal court in Wichita.

IT IS THEREFORE ORDERED that plaintiff's motion to alter or amend is hereby granted as set forth in this opinion. The

court's order of April 24, 1987 shall be amended to dismissal without prejudice.

IT IS SO ORDERED.

Dated this 24th day of February, 1988 at Topeka, Kansas.

Richard D. Rogers

United States District Judge

(Filed 4/24/87)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

RONALD MASTERS, Plaintiff,	)	
vs.	)	Case No. 86-4268-R
DANIEL INTERNATIONAL CORPORATION, Defendant.	)	

MEMORANDUM AND ORDER

This is a "whistle blower" action based on diversity jurisdiction. Plaintiff alleges that he was discharged by the defendant from his position as structural weld inspector at the Wolf Creek nuclear power plant, located near New Strawn, Kansas, in retaliation for reporting safety hazards at the plant to the Nuclear Regulatory Commission. This matter is presently before the court upon defendant's motion to dismiss.

This case was originally filed in federal court in Illinois. Plaintiff's complaint contained three causes of action. The first claim was a retaliatory discharge claim; the second claim was an intentional infliction of emotional distress claim; and the third claim was a civil rights claim based upon the United States Constitution. Judge Harold Baker of the United States District Court for the Central District of Illinois dismissed plaintiff's third cause of action and transferred the case to this district pursuant to 28 U.S.C. §1404(a). The defendant had also sought dismissal of plaintiff's first two claims, but Judge Baker held those arguments in abeyance for a decision by this court. This court shall now consider those contentions.

In the instant motion, defendant contends that Counts I and II of plaintiff's complaint do not state claims upon

which relief can be granted. Defendant contends that Kansas law does not recognize causes of action for retaliatory discharge and intentional infliction of emotional distress based upon the allegations made by the plaintiff. Defendant further argues that plaintiff's claims are preempted by Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851. Finally, defendant asserts that plaintiff is estopped from bringing this action based upon a release he signed on August 22, 1984.

The court will first consider plaintiff's retaliatory discharge claim. The law in Kansas is clear that in the absence of a contract between the employer and employee which establishes the duration of employment, the employment is terminable at the will of either party. Johnson v. National Beef Packing Co., 220 Kan. 52,

551 P.2d 779, 781 (1976). There is, however, a limited exception to this rule. In Murphy v. City of Topeka, 6 Kan.App.2d 488, 630 P.2d 186 (1981), the Kansas Court of Appeals held that an employee may bring a tort action for retaliatory discharge when he is terminated for filing a workmens' compensation claim. The court stated:

> We believe the public policy argument has merit. The Workmens' Compensation Act provides efficient remedies and protection for employees, and is designed to promote the welfare of the people in this state. It is the exclusive remedy afforded the injured employee, regardless of the nature of the employer's negligence. To allow an employer to coerce employees in the free exercise of their rights under the act would substantially subvert the purpose of the act.

Id., 630 P.2d at 192.

The exact boundaries of the exception created in Murphy have yet to be determined by the Kansas courts. The courts,

however, have provided some guidelines. A review of those decisions provides some guidance for the instant case.

In Tarr v. Riberglass, Inc., No. 83-4234 (D.Kan., unpublished, 2/8/84), we held that the exception created in Murphy did not extend to an employee terminated in violation of the Kansas public policy against age discrimination. We determined that in order to state a claim of retaliatory discharge a person must meet two requirements: (1) that he was discharged in contravention of public policy; and (2) that he is without any other remedy under either federal or state law. Id. The rationale underlying these requirements is that the courts have sought to protect certain policies of the communities by providing a remedy for at-will employees who were otherwise helpless in the face of employer conduct that violated these

policies. To the extent an employee has other remedies, however, the public policy is sufficiently served and there is no need for judicial creation of new causes of action. Id.

In Wynn v. Boeing Military Airplane Co., 595 F.Supp. 727 (D.Kan. 1984), Judge Theis refused to adopt the "no other remedy available" requirement for the recognition of public policy exceptions to the Kansas employment-at-will doctrine. He held that an employee discharged because of his race could assert a retaliatory discharge claim despite remedies that existed under state and federal law. He reasoned that a retaliatory discharge action "may provide remedies not available under the federal law and does not have requisites that the federal law possesses." Id. at 729. Judge O'Connor, however, has chosen to follow the "no other remedy available" requirement estab-

lished in Tarr and declined to follow the Wynn analysis. See Polson v. Davis, 635 F.Supp. 1130, 1149-50 (D.Kan. 1986) (Murphy not extended to employee discharged because of sex or because of opposition to employer's sexually discriminatory practices); Robinson v. Colt Industries, No. 84-2472 (D.Kan., unpublished, 3/5/86) (Murphy not extended to employee discharged because of sex). In Polson, Judge O'Connor stated:

> Given the strong public Kansas policy in favor of employment-at-will, we find it unlikely that the Kansas courts would recognize an exception to this doctrine where plaintiff has an adequate remedy for the conduct complained of--even though one could conceive of a remedy offering more comprehensive relief. (emphasis in original).

635 F.Supp. at 1150

We continue to adhere to the requirement set forth in Tarr that an employee

must be without any other remedy under federal or state law in order to assert a retaliatory discharge claim under Kansas law. We continue to believe, despite Judge Theis' opinion in Wynn, that the Kansas courts would not create a further exception to the employment-at-will doctrine if an employee had an alternate remedy. The court's adherence to this belief is reinforced by a recent decision of the Kansas Supreme Court.

Following Murphy, the issue arose as to whether an employee covered by a collective bargaining agreement which provided for discharge only upon just cause and contained a mandatory grievance and arbitration procedure could assert a retaliatory discharge claim. The federal judges in Kansas reached differing results. In Sutton v. Southwest Forest Industries, Inc., 643 F.Supp. 662 (D.Kan. 1986), Judge Saffels held that an employee covered by a

collective bargaining agreement could assert a retaliatory discharge claim, while in Edwards v. Western Manufacturing, 641 F.Supp. 616 (D.Kan. 1986), Judge Kelly held that such a claim could not be asserted by an employee covered by a collective bargaining agreement. The Kansas Supreme Court settled the issue in Cox v. United Technologies, Essex Group, Inc., 240 Kan. 95, 727 P.2d 456 (1986). In Cox, the Kansas Supreme Court held that Murphy would not be extended to include employees covered by collective bargaining agreements. The Court stated:

> An employee covered by a collective bargaining agreement . . . precluding discharge except for proper cause and providing for a grievance procedure which includes binding arbitration is adequately protected contractually from retaliatory discharge. The public policy of Kansas does not require that the tort of retaliatory discharge . . . be extended to include employees covered by a collective bargaining agreement . . .

Id., 727 P.2d at 459.

The Cox case essentially affirms the position taken by this court in Tarr in that the Kansas courts will not recognize a retaliatory discharge claim where the employee has other remedies available. In Cox, the Court quoted extensively from and relied upon a decision from Pennsylvania, Phillips v. Babcock & Wilcox, 349 Pa.Super. 351, 503 A.2d 36 (1986), in which the court carefully noted that the employee covered by a collective bargaining agreement had adequate remedies available to him. The reasoning of that court has some importance to this case:

> Appellant and all like-situated employees are not without recourse when faced with indiscriminate discharge even when the discharge violates public policy. The collective bargaining agreement in this instant case provides protection

> against suspension or discharge without 'proper cause.' Surely, in pursuing a grievance under the provisions of the agreement, if appellant can show that his discharge was in retaliation for his filing a workmen's compensation claim, he will have proved that his discharge was not for 'proper cause.' It would appear, therefore, that appellant will then be entitled to the remedies provided in the agreement.
>
> Furthermore, we are not persuaded by appellant's argument that the wrongfully discharged at-will employee has greater remedies available in a civil action than does a union employee under a collective bargaining agreement since a civil court could award punitive damages. While the at-will employee may be entitled to punitive damages in a civil action, he does not have the ability to obtain some of the remedies available to union members; such as reinstatement to his position, which is a commonly provided remedy in labor agreements. Thus, we find that a difference in remedies is not enough to justify an extension of the coverage of the wrongful discharge action.

Id., 503 A.2d at 37-38.

We do, however, acknowledge that the Kansas Supreme Court, despite several

opportunities, has never actually embraced the "no other available remedy" doctrine established in Tarr. Nevertheless, the clear message of Cox is that Murphy should not be extended in situations where an employee has other remedies available. The Kansas courts have been very timid in expanding the retaliatory discharge exception to the long-established employment-at-will doctrine. This is, of course, how we feel it should be since we are dealing with a judicially created exception. The Kansas legislature should act if this exception is to be substantially expanded. Without such action, courts should be reluctant to enlarge the exception, particularly where other remedies are available.

In the instant case, there is no dispute that plaintiff had other remedies available to him. Section 210 of the

Energy Reorganization Act, 42 U.S.C. §5851, provides a federal cause of action to employees who are discharged for complaining about or reporting nuclear safety hazards in the workplace. An employee so discriminated against can obtain injunctive relief, compensatory damages and punitive damages. The remedies provided by §5851 to employees in nuclear plants are adequate. The availability of this remedy precludes the court from expanding Murphy to include the situation presented by this case. It appears that plaintiff has, unfortunately, failed to timely take advantage of the remedies provided under the Energy Reorganization Act. We do not find that this fact has any impact on our previous ruling. This court is only concerned whether other remedies were available, not whether they are still available to the employee. Accordingly, we must grant defendant's motion to dismiss Count

I of plaintiff's complaint for failure to state a claim upon which relief can be granted.

The court shall next consider plaintiff's intentional infliction of emotional distress claim. Such a claim is generally referred to in Kansas as an "outrage" claim. See Roberts v. Saylor, 230 Kan. 289, 637 P.2d 1175, 1177 (1981). Four elements must be demonstrated to establish a claim for outrage: (1) the conduct of the defendant must be intentional or in reckless disregard of plaintiff; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the defendant's conduct and plaintiff's mental distress; and (4) plaintiff's mental distress must be extreme and severe. Id., 637 P.2d at 1179. It is, however, for the court to determine if two threshold requirements have been met

before an outrage claim may be allowed to proceed. First, the court must be convinced that reasonable fact finders might differ as to whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Second, the court must determine whether the emotional distress suffered by the plaintiff is of such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it. Id., 637 P.2d at 1180.

The courts in Kansas have on several occasions considered the first threshold requirement in the context of employment discharge cases. These cases have generally held that the termination of an employee does not rise to the level of conduct necessary for an outrage cause of action. See Polson v. Davis, supra, at 1150-51; Fletcher v. Wesley Medical Center, 585

F.Supp. 1260, 1262 (D.Kan. 1984); Pickert v. Kiley, No. 83-4021 (D.Kan., unpublished, 1/30/86); Mattern v. Chance Manufacturing Co., Inc., No. 82-1841 (D.Kan., unpublished, 2/9/84). As Judge Kelly stated in Fletcher:

> [T]he termination of an employee, whatever the secret motive underlying it, is the kind of event that happens every day; such an act is not even a breach of modern-day business etiquette, much less an uncivilized barbarism. Quite a bit more--such as the endless stream of vulgar, racist invective and threats of violence uttered by the defendant in Gomex v. Hug, 7 Kan.App.2d 603, 645 P.2d 916 (1982)--must accompany a firing if it is to be deemed "outrageous."

585 F.Supp. at 1262.

In accordance with the foregoing cases, we must conclude that plaintiff has failed to set forth a claim for outrage under Kansas law. Plaintiff's contention that he was harassed and terminated for reporting safety violations to the Nuclear

Regulatory Commission are insufficient to state an outrage cause of action. Accordingly, the court shall also grant defendant's motion to dismiss on Count II of plaintiff's complaint.

With the aforementioned rulings, the court finds it unnecessary to consider the other arguments raised by the defendant. Defendant's motion shall be granted and this action shall be dismissed.

IT IS THEREFORE ORDERED that defendant's motion to dismiss be hereby granted. Both of plaintiff's remaining claims are hereby dismissed for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED.

Date this 24th day of April, 1987 at Topeka, Kansas.

Richard D. Rogers

United States District Judge